The Prevailing Culture Over Immigration: Centralized Immigration and Policies Between Attrition and Accommodation

Antonios Kouroutakis[*]

In 2012, the Supreme Court delivered a decision in Arizona v. United States that attracted the interested of the press because it challenged a controversial immigration law which several states copied. Although faced with an opportunity to speak about immigration policy reform, the Court ruled on preemption issues instead. The case is still important, however, because the prevailing culture surrounding immigration is enshrined within its content. This article argues that there is a twofold divide in the legal culture surrounding immigration. The Court's decision explicitly confirms the "centralization" trend, which is the need for central decision making instead of allowing for state-specific polices. Alternatively, this case implicitly confirms the rise of a new dipole in immigration policies between attrition through enforcement and accommodation through massive or limited amnesty. At first glance, this case seems to have limited precedential value; however, it encapsulates the present status quo of immigration policies in the United States and the dipole in the political debate between attrition and accommodation, and it embodies the immigration acquis.

[*] Assistant Professor, IE Law School. Professor Kouroutakis (DPhil Oxon) teaches constitutional law and administrative law.

I. INTRODUCTION

On April 23, 2010, Arizona Governor Jan Brewer signed what is arguably the most controversial immigration law in the history of the United States. Introduced as Arizona Senate Bill 1070,[1] the "Support Our Law Enforcement and Safe Neighborhoods Act" was amended by House Bill 2162,[2] and is commonly known as S.B. 1070 legislation (S.B. 1070). It was perceived by the press as the most stringent and toughest law to address illegal immigration.[3] In fact, this remark has more value if we take into consideration that more than 160 laws on immigration have been enacted since 2010.

One thing that S.B. 1070 created was two criminal offenses, making it a crime for someone with illegal immigration status to be present in the state of Arizona[4] or to seek employment there.[5] S.B. 1070 also granted broad authority to state and local officers, who have traditionally enforced federal immigration law together with federal officials.[6] Pursuant to S.B. 1070, officials can question individuals about their immigration status based on a reasonable suspicion that they

---

[1] S.B. 1070, 49th Leg., 2d Reg. Sess. (Ariz. 2010).

[2] H.B. 2162, 49th Leg., 2d Reg. Sess. (Ariz. 2010).

[3] Randal C. Archibold, *Arizona Enacts Stringent Law on Immigration*, N.Y. TIMES (Apr. 23, 2010), http://www.nytimes.com/2010/04/24/us/politics/24immig.html. For more details, *see* Ian Gordon & Tanseem Raja, *164 Anti-Immigration Laws Passed Since 2010? A MoJo Analysis'Analysis*, MOTHER JONES (Mar./Apr. 2012), http://www.motherjones.com/politics/2012/03/anti-immigration-law-database.

[4] ARIZ. REV. STAT. ANN. §13-1509 (2016).

[5] ARIZ. REV. STAT. ANN. §13-2928(C) (2016).

[6] *See, e.g.,* Estrada v. Rhode Island, 594 F.3d 56 (1st Cir. 2010); United States v. Vasquez-Alvarez, 176 F.3d 1294 (10th Cir. 1999); Gonzalez v. City of Peoria, 722 F.2d 468 (9th Cir. 1983) (regarding the dual role of state and local officials in the administration of immigration law together with their federal counterparts).

might be undocumented immigrants.[7] Additionally, officials can arrest anyone without a warrant if the arrestee committed a public offense that makes them removable.[8] Understandably, these provisions raised substantial constitutionality issues relating to racial profiling.

Arizona legislators were vocal about S.B. 1070's purpose. The bill's preamble before the Senate states:

> the intent of this act is to make attrition through enforcement the public policy of all state and local government agencies in Arizona. The provisions of this act are intended to work together to discourage and deter the unlawful entry and presence of aliens and economic activity by persons unlawfully present in the United States.[9]

Even before the scheduled day for the promulgation of S.B. 1070, opponents began challenging the law's constitutionality.[10] The Department of Justice filed a lawsuit against the State of Arizona in the U.S. District Court for the District of Arizona on July 6, 2010, claiming that S.B. 1070 was unconstitutional because federal immigration law preempted S.B. 1070, and that S.B. 1070 violated the Supremacy Clause and the Commerce Clause of the Constitution of the United States.[11]

It was not long before the Supreme Court heard the case.[12] After the Supreme Court granted certiorari, twenty amici curiae were submitted in support of Arizona, while twenty-one amici curiae were submitted in support of the federal government, and one neutral brief was submitted.[13] A study of these third-party documents demonstrates the centrality that the amici placed on human rights concerns. Specifically, the amici argued that S.B. 1070 triggered Fourth Amendment and the Equal Protection violations. For example, the Rutherford Institute urged "the Court [to] be mindful of an even greater

---

[7] ARIZ. REV. STAT. ANN. §11-1051(B) (2016).

[8] ARIZ. REV. STAT. ANN. §13-3883(A)(5) (2016).

[9] S.B. 1070, 49th Leg., 2d Reg. Sess., § 1 (Ariz. 2010).

[10] *See* Ann Morse, *Arizona's Immigration Enforcement Laws,* NATIONAL CONFERENCE OF STATE LEGISLATURES (last updated July 28, 2011), http://www.ncsl.org/issues-research/immig/analysis-of-arizonas-immigration-law.aspx; Catherine Han Montoya & Ron Bigler, *The Aftermath of Arizona's S.B. 1070*, (last visited Sept. 20, 2016), http://www.civilrights.org/monitor/winter-2012/the-aftermath-of-arizonas.html.

[11] Complaint at 1, 68, United States v. Arizona, 703 F. Supp. 2d 980 (D. Ariz. 2010) (No. 10-1413), https://www.justice.gov/sites/default/files/opa/legacy/2010/07/06/az-complaint.pdf.

[12] Arizona v. United States, 132 S. Ct. 2492 (2012).

[13] Arizona v. United States, SCOTUSBLOG, http://www.scotusblog.com/case-files/cases/arizona-v-united-states/ (last visited Oct. 16, 2016).

concern: that the bill is preempted by our nation's Bill of Rights."[14] This gave the Supreme Court a chance to consider the compatibility of attrition policies within the human rights framework. In its decision, the Court side-stepped the civil rights issues because the government's own submissions did not claim a violation of the Equal Protection Clause of the Fourteenth Amendment. Interestingly, plaintiffs eventually conceded to this during the oral procedure when the Chief Justice raised the issue.[15]

The legal dispute in the Arizona case focused on whether Arizona, as a state sovereign, has the power to implement immigration policies. The Court applied traditional preemption principles previously articulated in case law.[16] Some scholars argue that, in actuality, the Court did not actually settle the constitutional preemption question in the immigration sphere.[17] However, a between-the-lines reading and an examination of the case from more than a legal perspective highlights that the real question before the Court was whether and to what extent policies deterring unauthorized immigration are acceptable under the current concept of the states' powers over immigration.

The case was decided by a 5-3 majority.[18] Justice Kagan recused herself because the case was originally filed during her time serving as Solicitor General in President Obama's cabinet.[19] The Court found three provisions (Sections 3, 5(C), and 6) of S.B. 1070 unconstitutional.[20] Specifically, Sections 3 and 5(C), introduced the abovementioned criminal offenses[21] and Section 6 authorized warrantless arrests.[22] The Court upheld Section 2(B), which authorizes police officers to inquire into immigrant documentation status.[23] The Court decided the case based on the preemption doctrine, finding that the federal government, and not the states, are competent to regulate immigration policy.[24] Thus, the Arizona case added another brick on

---

[14] Brief of Rutherford Institute as *Amicus Curiae* in Support of Respondent at 2, Arizona v. United States, 132 S. Ct. 2492 (2012) (No. 11-182).

[15] Transcript of Oral Argument at 33-34, Arizona v. United States, 132 S. Ct. 2492 (2012) (No. 11-182), https://www.supremecourt.gov/oral_arguments/argument_transcripts/11-182.pdf.

[16] *Arizona*, 132 S. Ct. at 2500–01.

[17] *See* Pratheepan Gulasekaram & Karthick Ramakrishnan, *Immigration Federalism: A Reappraisal*, 88 N.Y.U. L. REV. 2074 (2013).

[18] *Arizona*, 132 S. Ct. at 2497.

[19] Arizona v. United States, SCOTUSBLOG, http://www.scotusblog.com/case-files/cases/arizona-v-united-states/ (last visited Oct. 16, 2016).

[20] *Arizona*, 132 S. Ct. at 2510.

[21] *Id.* at 2497–98.

[22] *Id.* at 2498.

[23] *Id*. at 2510.

[24] *Id*.

the "preemption legal framework" in the immigration arena, a topic known as "immigration federalism."

Besides its value regarding substantive preemption jurisprudence, the decision is equally important for what the Court did not say. S.B. 1070 criminalized the status of undocumented immigrants in an attempt to deter unauthorized immigrants from coming to, and remaining in, the state. The proposed law straddled the line between immigration law and criminal law, a concept known as crimmigration.[25] The public debate about illegal immigration has shifted from the past dichotomy between deportation and massive amnesty, to a new dipole between attrition through enforcement and accommodation.[26]

A careful reading of the decision provides us with the paramount conclusion about the legal culture over immigration policies. Immigration policy is a daunting task because of its complicated nature and its national and international implications. Subnational interests and peripheral governments often place the practical burden of implementation on state and local authorities. Immigration flow into specific "host states" significantly impacts that host state. Since immigration dynamics vary across time and across states, the Court's decision confirms the need for a more holistic approach to the immigration problem. There has been a shift from federalist immigration to centralized immigration, where the federal government frames the policy, and states implement and enforce those policies, while also adjusting those policies when necessary.

The article proceeds as follows; Part A will analyze the issues presented in the Arizona case and discuss various institutional concerns raised by the Court pertaining to which legislative body is better suited to regulate in this area. Part B will explore various arguments for and against centralized immigration to demonstrate the divergent viewpoints and differences between local and national approaches. This part will highlight the shift from the federalist immigration to centralized immigration. Part C will turn its focus to the legal framework of undocumented immigrants in the U.S., and particularly the immigration problem of Arizona. The analysis in this part explains the impetus behind Arizona's enactment of such restrictive legislation and presents the concerns of the federal government and the position of the Court. Further, it will argue that these policies apparently aim to

---

[25] Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power,* 56 AM. U.L. REV. 367, 376 (2006).

[26] Kris W. Kobach, *Attrition through Enforcement: A Rational Approach to Illegal Immigration,* 15 TULSA J. COMP. & INT'L L. 155 (2008).

limit the number of undocumented immigrants, to discourage new undocumented immigrants to enter the country and to encourage those already there to depart. Finally, this part will conclude with discussing the new dipole in the immigration political debate, which on the one hand there is the aim of attrition, and on the other hand there is the aim of policy to accommodate undocumented immigrants by creating paths for lawful immigration status with constitutional protections.

II. THE SUPREME COURT CASE: LEGAL ISSUES

A. The Case: Issues and Procedural History

The United States filed suit against the State of Arizona claiming that Sections 2(B), 3, 5, and 6 of S.B. 1070 were unconstitutional.[27] The federal government argued that Congress's pervasive immigration legislation preempted any state legislative action.[28] In its defense, Arizona responded that the Act does not violate the Supremacy Clause, and that the enforcement of the Act functions within the scope of the federal immigration law.[29]

Section 3 made the failure to comply with federal alien registration a state misdemeanor,[30] while Section 5(C) made it a misdemeanor for an unlawful alien to seek or engage in work in the state.[31] Interestingly, both of these already constituted civil violations under existing federal law.[32] The question presented to the Court regarding these provisions was whether Arizona could impose its own penalties for an otherwise illegal act.[33] Section 6 authorizes police officers to make a warrantless arrest of a person if the officer has probable cause to believe that this person has "committed any public offense that makes the person removable from the United States."[34] Section 2(B), also known as the "status check provision," requires police officers to verify immigration status when they conduct a stop, detention, or arrest.[35]

---

[27] Complaint at 1, 68, United States v. Arizona, 703 F. Supp. 2d 980 (D. Ariz. 2010) (No. 10-1413), https://www.justice.gov/sites/default/files/opa/legacy/2010/07/06/az-complaint.pdf.

[28] *Id.* at 1.

[29] Brief for Petitioners at 28, Arizona v. United States, 132 S. Ct. 2492 (2012) (No. 11-182).

[30] ARIZ. REV. STAT. ANN. §13-1509 (2016).

[31] ARIZ. REV. STAT. ANN. §13-2928(C) (2016).

[32] 8 U.S.C. § 1227 (2016).

[33] Arizona v. United States, 132 S. Ct. 2492, 2502 (2012).

[34] ARIZ. REV. STAT. ANN. §13-3883(A)(5) (2016).

[35] ARIZ. REV. STAT. ANN. §11-1051(B) (2016).

On July 28, 2010, a district court issued a preliminary injunction preventing these four provisions of S.B. 1070 from taking effect.[36] The Ninth Circuit affirmed the lower court's decision, acknowledging the likelihood of the federal government's success on its preemption argument.[37]

B. The Supreme Court Decision

Justice Kennedy delivered the 5-3 majority opinion of the Court, while Justices Scalia, Thomas and Alito filed opinions concurring in part and dissenting in part. The specific issue before the Court was whether, under the Supremacy Clause's preemption principles, federal law permits the four provisions of S.B. 1070 in dispute.[38] The majority found that the provisions criminalizing otherwise civil violations, Sections 3 and 5, and the warrantless arrest provision, Section 6, were unconstitutional.[39] The Court, however, upheld the constitutionality of the status check provision, Section 2(B), allowing local authorities to inquire into an immigrant's status.[40]

The Court examined the case thematically. It isolated the provisions in dispute, presented the main arguments of each side, and evaluated existing legal framework, legislation, and case law to determine the constitutionality of the provisions. The Court reiterated that the "plenary power doctrine," the federal government's well-established authority to regulate immigration matters, is based both in the Constitution and on case law.[41] Indeed, *Henderson v. Mayor of New York* first established the federal government's broad immigration power 1875.[42] In *Henderson*, the Court expressed the need for a uniform immigration policy, noting that "[t]he laws which govern the right to land passengers in the United States from other countries ought to be the same in New York, Boston, New Orleans, and San Francisco."[43]

After the Supreme Court in *Arizona* explained the plenary power vested in the federal government to regulate immigration, the Court described Congress's pervasive presence in the immigration arena. It noted, for example, that Congress has criminalized unlawful entry and

---

[36] United States v. Arizona, 703 F. Supp. 2d 980, 986 (D. Ariz. 2010), *overruled by* Arizona, 132 S. Ct. 2492.

[37] *Arizona*, 132 S. Ct. at 2494.

[38] *Id*. at 2497.

[39] *Id.* at 2510.

[40] *Id.*

[41] *Id.* at 2498.

[42] Henderson v. Mayor of New York, 92 U.S. 259 (1875).

[43] *Id.* at 273.

reentry and authorized states to deny public benefits to immigrants.[44] The Court then explained that local immigration officials are granted wide discretion to implement immigration policy and states can address their unique immigration issues, provided their actions do not violate federal preemption.[45]

III. CENTRALIZED IMMIGRATION POLICIES: COM-IMMIGRATION

A. The Antithetical Approaches on Immigration Law-Making and the "Golden Ratio"

The Supreme Court has long-since established that the federal government is vested with the power of law-making regarding immigration.[46] What remains a murky immigration policy question, unguided by the Constitution or case law, is where to find the correct balance between federal power and that of the states.

The Immigration and Nationality Act (INA) codifies most federal immigration official authority and confers substantial enforcement authority to state officials.[47] The Supreme Court has previously held that states may lawfully adopt regulations complementary to federal immigration laws in a context not already regulated by the INA.[48] Hence, the balance of competence between the federal government and the states revolves around the golden ratio within the normative concept of federal immigration, which implies a partnership between federal and state government.[49]

The Court ultimately held that three provisions of S.B. 1070 unconstitutionally disturbed that balance, but each for different reasons. Section 3 was incompatible with federal law regarding penalties.[50] Section 5(C) was inconsistent with the clear intent of Congress to abstain from the imposition of criminal sanctions against undocumented immigrants seeking work.[51] Section 6's warrantless

---

[44] *Arizona*, 132 S. Ct. at 2499.

[45] *Arizona*, 132 S. Ct. at 2500–01.

[46] *See, e.g.*, Fong Yue Ting v. United States, 149 U.S. 698 (1893); Henderson v. Mayor of New York, 92 U.S. 259 (1876); Chy Lung v. Freeman, 92 U.S. 275 (1876).

[47] Immigration and Nationality Act, Pub. L. No. 82-414, § 101, 66 Stat. 163, 167 (1952) (codified as amended at 8 U.S.C. § 1101 *et seq.*).

[48] De Canas v. Bica, 424 U.S. 351, 355 (1976), *superseded by statute*, Immigration and Nationality Act, 8 U.S.C. § 1101 *et seq.* (2014).

[49] Hiroshi Motomura, *The Discretion that Matters: Federal Immigration Enforcement and State and Local Arrests, and the Civil-Criminal Line*, 58 UCLA L. REV. 1819, 1821 (2011).

[50] Arizona v. United States, 132 S. Ct. 2492, 2502–03 (2012).

[51] *Id*. at 2505.

arrest created an obstacle to the cooperation between federal and state officers.[52]

Writing for the majority, Justice Kennedy stressed that "[t]he National Government has significant power to regulate immigration. With power comes responsibility, and the sound exercise of national power over immigration depends on the Nation's meeting its responsibility to base its laws on a political will informed by searching, thoughtful, rational civic discourse."[53] Similarly, regarding the federal government's unique stake in immigration policy, Justice Kennedy stated:

> Discretion in the enforcement of immigration law embraces immediate human concerns. Unauthorized workers trying to support their families, for example, likely pose less danger than alien smugglers or aliens who commit a serious crime. The equities of an individual case may turn on many factors, including whether the alien has children born in the United States, long ties to the community, or a record of distinguished military service. Some discretionary decisions involve policy choices that bear on this Nation's international relations. Returning an alien to his own country may be deemed inappropriate even where he has committed a removable offense or fails to meet the criteria for admission. The foreign state may be mired in civil war, complicit in political persecution, or enduring conditions that create a real risk that the alien or his family will be harmed upon return. The dynamic nature of relations with other countries requires the Executive Branch to ensure that enforcement policies are consistent with this Nation's foreign policy with respect to these and other realities.[54]

The Court also acknowledged the role of the States in immigration policy, noting that "[t]he pervasiveness of federal regulation does not diminish the importance of immigration policy to the States."[55] Explicitly referring to Arizona, the Court evidenced the unauthorized immigration issue and acknowledged that the problem is real and extensive, and that "[s]tatistics alone do not capture the full extent of Arizona's concerns. Accounts in the record suggest there is an 'epidemic of crime, safety risks, serious property damage, and

---

[52] *Id*. at 2507.
[53] *Id*. at 2510.
[54] *Id.* at 2499.
[55] *Id*. at 2500.

environmental problems' associated with the influx of illegal migration across private land near the Mexican border."[56]

It is estimated that 11.9 million undocumented immigrants live in the United States, who constitute 4 percent of the nation's population and 5.4 percent of the workforce population.[57] In 2009, undocumented immigrants were estimated to compose 5.8 percent of Arizona's population and 7.5 percent of its labor force.[58] The very same year in Maricopa County—the most populous area of the State of Arizona, encompassing over half of the state's residents—it was reported that unlawful aliens were responsible for more than 10 percent of serious crimes (i.e. felonies).[59] In addition, according to the analysis of data from the State Criminal Alien Assistance Program in 2004, illegal immigrants compose 11.1 percent of Arizona's prison population.[60] These statistics highlight the degree to which the presence of illegal immigrants has sufficiently burdened Arizona.

The Court further clarified the golden ratio by finding the status check provision, Section 2(B), constitutional.[61] The Court held that states are not precluded from regulating complementary to the federal enforcement scheme, so long as they do not undermine federal law.[62] It rejected the federal government's concern that the status verification provision was unconstitutional because it is mandatory and provides for the possibility of prolonged detention.[63] Unlike the other provisions of S.B. 1070 that the Court found to be unconstitutional, the status check provision found the appropriate constitutional ratio of cooperation between federal and state governments.

The Court's ruling determines the golden ratio in federal immigration, both positively and negatively. Positively, federal law shall leave room for the state to regulate. Negatively, a state provision

---

[56] *Arizona*, 132 S. Ct. at 2500.

[57] Jeffrey S. Passel & D'Vera Cohn, *A Portrait of Unauthorized Immigrants in the United States,* PEW RESEARCH CENTER (Apr. 14, 2009), http://www.pewhispanic.org/2009/04/14/a-portrait-of-unauthorized-immigrants-in-the-united-states/.

[58] Jeffrey S. Passel & D'Vera Cohn, *U.S. Unauthorized Immigration Flows Are Down Sharply Since Mid-Decade*, PEW RESEARCH CENTER (Sept. 1, 2010), http://www.pewhispanic.org/2010/09/01/us-unauthorized-immigration-flows-are-down-sharply-since-mid-decade/.

[59] Steven A. Camarota & Jessica Vaughan, *Immigration and Crime: Assessing a Conflicted Issue*, CENTER FOR IMMIGRATION STUDIES (Nov. 2009), http://cis.org/ImmigrantCrime.

[60] *Id.*, tbl.6.

[61] *Arizona*, 132 S. Ct. at 2510.

[62] *Id.*

[63] *Id.* at 2509.

may not contradict federal law, be incompatible with Congress's intent, nor create obstacles to the application of the federal law.

B. The Case for Centralized Immigration

The Court's opinion, which advocates for the centralization of immigration laws by the federal government, represents a relatively new outlook regarding immigration policymaking. The House of Representatives attempted to revive the pre-*Arizona v. United States* philosophy empowering the state's ability to enact their own immigration law, when it passed the SAFE Act. This was *ab initio* ineffective since it did not pass in the Senate, and Congress cannot overturn the Supreme Court's constitutional interpretation.[64] This signifies a priority shift towards national concerns by approaching the immigration problem holistically. The question of the centralization, however, remains an ongoing debate.

Governor Brewer, along with many in her corner, argued that the federal government failed to sufficiently block the flow of illegal immigrants into the United States. States sharing a border with Mexico[65] are particularly affected by the flow of undocumented migrant workers and have a vested interest in immigration policy, as they carry a "disproportionate share of the cost of illegal immigration."[66] The recent surge of the undocumented population in the United States, even though nowadays is stabilized, intensifies the need for immigration policy reform. Over the last two decades, a notable increase in the number of undocumented immigrants has been observed all over the United States.[67] With this backdrop, the Court defined the parameters of the partnership between federal and state government in immigration policy.

Although each state, region, and county suffers from unique immigration problems, a successful immigration policy must take a broad approach unrestricted from the interests of the local society.[68] Some practical concerns highlight the need for holistic immigration policies as well. As the Court noted, the federal government is

---

[64] Josefina Aguila, Note, *The Federal Immigration Power: Why Congress Cannot Overturn the Court's Decision in Arizona v. United States*, 28 GEO. IMMIGR. L.J. 663, 664 (2014).

[65] Arizona itself shares a 370-mile border with Mexico. Brief for Petitioners at 1, Arizona v. United States, 132 S. Ct. 2492 (2012) (No. 11-182).

[66] *Id*.

[67] Passel & Cohn, *supra* note 57.

[68] *See* Aguila, *supra* note 64, at 674 (discussing the implications of placing immigration policy within the exclusive jurisdiction of the federal government).

uniquely situated to regulate immigration policies and has a special interest in immigration policy irrelevant to the individual states.[69]

Arizona was not alone in its quest for immigration policy reform. Shortly after Arizona enacted S.B. 1070, similar bills were introduced in South Carolina, Pennsylvania, Minnesota, Rhode Island, Michigan and Illinois.[70] The Court's centralized vision of immigration policy effectively blocked this multiplier effect. On a positive note, individual states no longer have the authority to implement a policy which would be unduly burdensome on another state. For example, a strict immigration policy from one state will likely reroute the flow of immigration to a neighboring state. The drawback of a centralized immigration policy, however, is that it disregards the interests of individual state, especially those suffering from illegal immigration problems. The adoption of S.B. 1070 threatened to burden neighboring states and spawned mass protests in and around the United States. Interestingly, Mexico submitted an amicus brief in support of the Federal Government.[71]

Unfortunately, the balance found by the Court is not the ultimate answer to the ongoing immigration problem. Deadlocks in Congress prevents it from keeping up with the times, and politician's concern for the motives of constituent voters causes such restrictionist legislation at the state level. What the Arizona decision shows is that the golden ratio of federal immigration is not absolute, and that a state role in immigration policy should not be overshadowed by the federal government's newfound competence. Hence, there is a shift from what is known as "federal immigration" to "com-immigration," where states are restrained in implementing federal legislation, but retain a decisive role on minor immigration issues.

IV. POLICIES BETWEEN ATTRITION AND ACCOMMODATION

Undoubtedly, the severity of the immigration problem poses new challenges. Legislators are constantly seeking new ways to enforce existing federal law and to implement original immigration policies. Arizona argued that it met this challenge by enacting S.B. 1070. Specifically, Arizona argued that Section 3 criminalized the failure to

---

[69] Arizona v. United States, 132 S. Ct. 2492, 2498 (2012).

[70] Ann Morse, *Arizona's Immigration Enforcement Laws,* NATIONAL CONFERENCE OF STATE LEGISLATURES (last updated July 28, 2011), http://www.ncsl.org/issues-research/immig/analysis-of-arizonas-immigration-law.aspx.

[71] *Amicus Curiae* Brief of the United Mexican States in Support of Respondent, Arizona v. United States, 132 S. Ct. 2492 (2012) (No. 11-182).

complete or carry an alien registration document, which sufficiently paralleled already existing federal law requiring immigrants to register with the government.[72] Alternatively, the United States argued that Section 3 created an unconstitutional Arizona-specific "supplement" to the nationwide immigration scheme, because it criminalized an act on which Congress chose only to impose civil liability.[73] In support of the government, the Court cited prior precedent that Congress's immigration policy is "a single integrated and all-embracing system," which does not allow the states to complement federal law by enforcing auxiliary regulations.[74] The Court further distinguished Sections 3 and 5, explaining that while Section 3 criminalized the failure to register as an alien, which already carried civil liability under federal law, Section 5 criminalized the application, solicitation, or performance of work in the state of Arizona.[75]

History has shown that civil sanctions are not a sufficient deterrent to prevent undocumented immigrants from entering the United States. Nor do civil sanctions encourage "self-deportation," which is the voluntary return of undocumented immigrants to their home country. Criminal sanctions are a viable option to combat the immigration problem, provided the federal government enacts them. Enacted on a state level, however, crimmigration affects the immigration policy of neighboring states and violates the expressed intent of the federal government. In fact, the Arizona legislature enacted S.B. 1070 with the intention of discouraging the presence of undocumented immigrants in Arizona.[76] The question of where those discouraged immigrants should go is easily answered—neighboring states.

Some scholars suggest that crimmigration does not answer the immigration problem. What would, however, is a combination of strictly enforced immigration laws. Others suggest the harsh adoption of policies regarding the detention, apprehension, removal, and grant of public assistance to undocumented immigrants.[77] One scholar goes so far as to wonder whether we should "encourage self-deportation by making life in the United States as difficult as possible for

---

[72] Reply Brief for Petitioners at 20, Arizona v. United States, 132 S. Ct. 2492 (2012) (No. 11-182).

[73] Brief for the United States at 11, Arizona v. United States, 132 S. Ct. 2492 (2012) (No. 11-182).

[74] *Arizona*, 132 S. Ct. at 2501–02 (quoting Hines v. Davidowitz, 312 U.S. 52, 74 (1941)).

[75] *Id.* at 2503.

[76] *See supra* note 9.

[77] STEPHEN H. LEGOMSKY & CRISTINA M. RODRÍGUEZ, IMMIGRATION AND REFUGEE LAW AND POLICY 1187 (5th ed. 2009).

undocumented immigrants, through such means as barring access to elementary, secondary, or tertiary education, or denying drivers' licenses, credit cards, identification cards, bank accounts, and even housing[.]"[78]

Some have taken issue with the idea of allowing police officers to demand documentation because by encouraging racial profiling, it violates civil rights.[79] Others contend that such laws are considered cruel, racist, and counterproductive because language, accent, and skin color would be the "suspicious" element law enforcement officers would use before inquiring about the immigration status of an individual.[80] These issues received international attention when the Inter-American Commission for Human Rights issued a press release "express[ing] its deep concern with the high risk of racial discrimination in the implementation of the law" and "with the criminalization of the presence of undocumented persons."[81] The Court, however, was not concerned with immigration policies and human rights; nor did it express any hesitation about the criminalization of immigration law. Commenting on the case, one scholar remarked that:

> Many of these laws [recent state enactments on immigration] were pushed by anti-immigration groups who expected a friendly embrace by the Roberts Court. What they found instead was that a solid majority of the court—the decision was 5–3, with Justice Elena Kagan recused—believes that only the federal government is authorized to make life miserable for undocumented aliens.[82]

The above statement accurately maps the second legal outcome of the case. The three unconstitutional provisions did not substantively bother the Court, and instead it merely held that federal legislation preempted the provisions. The Court implied that a Congressional

---

[78] Stephen H. Legomsky, *Portraits of the Undocumented Immigrant: A Dialogue*, 44 GA. L. REV. 65, 68 (2009).

[79] Julia Preston, *Immigration Advocates Rally for Change*, N.Y. TIMES (May 1, 2010), http://www.nytimes.com/2010/05/02/us/02immig.html?pagewanted=all.

[80] Editorial, *It Gets Even Worse: New Anti-Immigrant Laws Are Cruel, Racist and Counterproductive*, N.Y. TIMES, July 4, 2011, at A18.

[81] Press Release, *IACHR Expresses Concern Over New Immigration Law in the State of Arizona in the United States*, Inter-Am. Comm'n H.R. (Apr. 28, 2010*) available at* http://www.cidh.oas.org/Comunicados/English/2010/47-10eng.htm.

[82] Adam Winkler, *What the Supreme Court's Arizona Ruling Means for Immigration and Health Care*, THE DAILY BEAST (Jun. 25, 2012), http://www.thedailybeast.com /articles/2012/06/25/what-the-supreme-court-s-arizona-ruling-means-for-immigration-and-healthcare.html.

crimmigration statute would be within the federal government's constitutional powers. In doing so, the Court kept the door open for Congress to enact legislation similar to Arizona's preempted provisions. Interestingly so, per the Court, a state cannot complement existing civil penalties with a criminal dimension, but the federal government can.[83] What the Arizona case implicitly describes is a current model of immigration policy centering on self-deportation and prevention of undocumented immigrants through (substantively constitutional) draconian legislation.

Conversely, some legislation and other Supreme Court cases indicate a different approach entirely, known as the "accommodation model." The Supreme Court has long recognized an accommodation legal framework, finding undocumented immigrants have a right to full criminal procedural safeguards,[84] public education for their children,[85] and the right to know deportation consequences of a guilty plea by their lawyer.[86] In addition, the Court has explicitly stated that the apprehension, detention, and removal of these immigrants necessarily implicates the rights, liberties, and personal freedoms of human beings.[87]

A new policy, known as the Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA), exemplifying the accommodation model was recently adopted. Arguably a separation of powers violation, DAPA granted a special deferred status to undocumented immigrants who are parents of either a U.S. citizen or an undocumented immigrant under certain conditions.[88]

The United States immigration debate centers around two antithetical policies. Some laws are adopted to discourage new, undocumented immigrants from entering, and to encourage those currently residing in the country to voluntarily depart. Other legislation aims for attrition, by providing a path for lawful immigration status.

V. CONCLUSION

Although Arizona state legislators claimed that their policies embodied in S.B. 1070 merely enforced existing federal immigration

---

[83] Arizona v. United States, 132 S. Ct. 2492, 2502 (2012).

[84] Wong Wing v. United States, 163 U.S. 228, 238 (1896).

[85] Plyler v. Doe, 457 U.S. 202, 230 (1982).

[86] Padilla v. Kentucky, 559 U.S. 356, 374 (2010).

[87] Hines v. Davidowitz, 312 U.S. 52, 68 (1941).

[88] *See*, Memorandum from Jeh Charles Johnson, Sec'y, U.S. Dep't of Homeland Sec., to León Rodríguez, Dir., U.S. Citizenship and Immigration Servs. (Nov. 20, 2014), *available at* http://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action.pdf.

legislation to combat the large number of aliens unlawfully residing in Arizona, their draconian legislation actually sought to prevent the presence of undocumented immigrants in Arizona. Critics feared that the tough measures in the law, together with broad discretion granted to law enforcement officers in identifying and apprehending illegal immigrants, encouraged racial profiling. The Court, however, was concerned that S.B. 1070 broke those boundaries constitutionally reserved for the federal government. The Court concluded that the Constitution entrusted the federal government with immigration policymaking.

Despite having an excellent opportunity to set the boundaries of substantive immigration policy, the case is primarily about preemption; yet, the case does have a significant impact on the prevailing legal culture over immigration in the United States. It highlights the shift in immigration policymaking from the local and regional dimension to a broad regime. The dynamic partnership between the federal and state governments has had its past terms amended, and the pendulum has swung closer towards the federal government. What remains to be seen is whether the federal government will exploit this power to combat the immigration problem.

Given that the Court has hinted that the federal government may adopt legislation like the preempted provisions of S.B. 1070, the political debate has spun off in two divergent and antithetical approaches. Attrition remains a viable option, implementing highly restrictive laws, and alternatively, accommodation is a valid path, providing an opportunity for lawful immigration status. Therefore, the Court's decision has limited value as a legal precedent. Instead, it encapsulates the trend for more holistic immigration policies and the dipole in the political debate between attrition and accommodation. The decision embodies the immigration acquis.